FILED
APR 13 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 856

COMMONWEALTH OF VIRGINIA,

Respondent,

against

E. R. DAUGHERTY, JR., EUGENE STITH, WILLIAM B. STITH, AMBROSE STITH, SR., AMBROSE STITH, JR., JOHN M. PRICE, MARK STITH, LEROY PARHAM, CLEVELAND STITH and CURTIS COLEMAN,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

CHARLES H. TUTTLE
BEECHER E. STALLARD
FRANCIS X. WARD
Of Counsel for Petitioners

STALLARD & KEENE
Central National Bank Building
Richmond 19, Virginia
Attorneys for Petitioners

807 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA 5-2400

INDEX

	PAGE
Opinions	2
Jurisdiction	2
Constitutional Provisions and Statute Involved	2
Statement of Case	2
Question Presented for Review	5
Argument	7
Point I—We respectfully submit, as to each of these petitioners separately, that there was no evidence that any act of violence was with his encouragement or concert; and that his conviction and sentence were, in consequence, denials of his liberties under the due process clause of the Fourteenth Amendment	7
Point II—Rejection of the theory that mere presence in the group made every member of it criminally responsible for any unlawful act by any other member, strips the respective convictions of any basis in due process of law	12
Mark Stith	13
Ambrose Stith, Jr.	15
Eugene Stith	16
William B. Stith	16

PAGE

Ambrose Stith, Sr. 17

Cleveland Stith 18

Curtis Coleman 20

John M. Price 21

Leroy Parham 22

E. R. Daugherty, Jr. 23

CONCLUSION—The petition for a writ of certiorari as prayed for should be granted 27

APPENDIX A. Judgment of Circuit Court 28

APPENDIX B. Judgment of Virginia Supreme Court of Appeals 37

APPENDIX C. Constitution and Statute involved 38

Cases Cited

Cafeteria Employees Union v. Angelos, 320 U. S. 293 ..... 11, 18

Chicago, Burlington &c. R'd v. Chicago, 166 U. S. 226 11

Cole v. Arkansas, 338 U. S. 345 ..... 5, 7

DeJonge v. Oregon, 299 U. S. 353 11

Gitlow v. New York, 268 U. S. 652 11

National Labor Relations Board v. Deena Artware, 198 F. 2d 645 (U. S. C. A. 6), cert. den. 345 U. S. 906 10

PAGE

Niemotko v. Maryland, 340 U. S. 268 11
Norris v. Alabama, 294 U. S. 587 12

Slochower v. Board of Higher Education of City of New York (U. S. Sup. Ct., April 9, 1956) 6

Thornhill v. Alabama, 310 U. S. 88 11

Constitutional Provision, Statutes, Etc.

Fourteenth Amendment to the Constitution of the United States, Section 1 38

28 U. S. C. A. §1257(3) 2

Code of Virginia, 1950, §40-64 38

Supreme Court of the United States

October Term, 1955

No. .....

COMMONWEALTH OF VIRGINIA,

Respondent,

against

E. R. DAUGHERTY, JR., EUGENE STITH, WILLIAM B. STITH, AMBROSE STITH, SR., AMBROSE STITH, JR., JOHN M. PRICE, MARK STITH, LEROY PARHAM, CLEVELAND STITH and CURTIS COLEMAN,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioners separately pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia entered in this case on January 18, 1956, affirming a judgment rendered by the Circuit Court of Brunswick County, Virginia, on August 18, 1955.

Copies of both judgments are annexed as Appendix A and Appendix B.

Opinions

No opinion was rendered by either the Supreme Court of Appeals of the Commonwealth of Virginia or the Circuit Court of Brunswick County in the Commonwealth of Virginia, other than the oral decision of the Circuit Court found at pages 375-388 of the Record.*

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1257(3).

Constitutional Provisions and Statute Involved

The constitutional provisions involved are those of the Fourteenth Amendment to the Constitution of the United States. (See Appendix C.)

The State statute involved is §40-64, Subdivision 1, of the Code of Virginia, 1950. (See Appendix C.)

Statement of Case

The grand jury for Brunswick County, Virginia, returned a four-count indictment against the petitioners and thirty-one other persons. The accused waived a trial by jury. The Trial Judge (Hon. J. Jordan Temple) heard the evidence and rendered judgment.

---

* The references are to pages of the typewritten transcript of the trial.

The petitioners were found guilty under the second count of the indictment which charged them in the terms of the Virginia Statute with unlawfully attempting to interfere and interfering with certain named persons in the exercise of the latters' right to work by the use of force, threats of violence and intimidation, and by the use of insulting and threatening language directed towards the workers, in order to induce them to quit their employment. Fines in varying amounts and jail sentences of six months (partially suspended in certain instances) were imposed upon each of the petitioners.

A majority of the employees of C. H. Perkinson Lumber Company in Brunswick, Virginia, voted in a National Labor Relations Board election to have Local Union 2518, United Brotherhood of Carpenters and Joiners of America, A. F. of L., represent them in negotiating a contract for employment. Petitioner Daugherty, employed by the Eastern District Council of Carpenters of Virginia, with which the local union was affiliated, was assisting the local union in its negotiations (R. 350). When an agreement could not be reached, some thirty employees went out on strike on May 31, 1955, and a picket line was set up around the property, the pickets walking on the two adjoining Highways and the railroad tracks (R. 79, 125, 264-5, 274, 346). The Union was also on strike at several other lumber mills in the county.

The indictment against the petitioners concerns the alleged conduct of the strikers and other persons on the morning of June 3, 1955.

The land of the Lumber Company consisted of some twenty-five acres, triangular in shape, and bounded by

State Highway 712, State Highway 634, a private road, and tracks of the Virginian Railroad.

The main line of the Virginian Railroad Company ran along the north side of the planing mill of the Lumber Company, and a spur track ran down to a concrete retaining wall which is set some forty-five feet from the north end of the mill (R. 16-17).

Shortly after work was commenced at the mill on June 3, 1955, two groups of men came along the main line track, one from the east, the other from the west, and congregated near a boxcar on the spur track which was being loaded with lumber (R. 50, 148, 183, 215). All the men were colored except petitioner Daugherty (R. 70, 258). There were "about 35 or 40 people" in the group (R. 250). Various persons carried the picket signs (R. 79, 125, 274, 295). The group maintained "a semblance of a picket line", with most of the men walking up and down or sitting on the tracks (R. 346). The site was such that train crews and passengers and travelers on the Highways would see that the Lumber Company employees were on strike (R. 273, 280, 283, 285, 290, 291, 295, 302, 313, 345).

Soon after the men congregated on the track, some rocks were thrown toward the mill (R. 57, 104, 122, 186-7, 216-7). The superintendent temporarily stopped the mill so no one would get hurt, and called the Sheriff (R. 57). The Sheriff and his officers arrived in about forty or sixty minutes, and spoke to the men in the group. The picket line then went away. After the Sheriff came, no more rocks were thrown. No one was injured by the rocks (R. 57-62, 103-4, 110, 151-2).

Neither Cumbia, the superintendent of the mill, nor any one of the workers, could identify the person or per-

sons who threw the rocks (R. 80, 103, 121, 151, 173, 187, 195, 378).

The men who were working in the mill lost no time from work. They were put to work at other things (R. 78) until the sheriff got there (R. 153).

The crowd broke up when the officers came and dispersed without any trouble (R. 62, 251, 253). The officers did not observe any violation of the law after they arrived, other than alleged trespassing (R. 253).

State Trooper Downey, who came with the other officers and who testified for the prosecution, estimated the group as "about 35 to 40 people" spread out over 200 feet (R. 250). He testified that the officers ordered them to disperse; that they immediately said "we are leaving" and scattered; that he had no complaint of any one being hit by a rock; and that "we didn't observe any violation of the law after we arrived other than the trespassing" (R. 249-253).

Question Presented for Review

We respectfully submit that, as to each of these petitioners, there is separately involved the constitutional question which was left open by this Court in *Cole* v. *Arkansas*, 338 U. S. 345, to wit (p. 352):

> "whether a state has power to incriminate by his mere presence an innocent member of a group when some individual without his encouragement or concert commits an act of violence. It will be time enough to review such a question as that when it is asked by one who occupies such a status."

Each of these petitioners is entitled to a separate consideration of whether, on the evidence, he "occupies such a status". If he does, then, unless mere presence in a group constitutes all members of the group criminal participants in any act of violence by one or several individuals, the petitioner has been deprived without due process of the liberties guaranteed him by the Due Process Clause.

In the Trial Court, before the sentencing of these petitioners was completed, their counsel moved to set aside the court's verdict and to strike the evidence on the ground that they were being deprived of "their liberties under the Due Process Clause of the Fourteenth Amendment" (pp. 393-4).

Among the "Errors Assigned" by the petitioners in their notice of appeal to the Virginia Supreme Court of Appeals was:

> "3. In overruling the motion of the accused to set aside the verdict and judgment of the court on the ground that the accused were being denied their liberties under the due process clause of the Fourteenth Amendment of the Constitution of the United States and the State Constitution."

Hence, the question presented by each petitioner separately is:

> Does the verdict and judgment of the Circuit Court of Brunswick County, Virginia, as affirmed by the Supreme Court of Appeals of Virginia, deprive the petitioner of his liberties under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

As recently as April 9, 1956, this Court in the *Slochower* case stated as the essence of the Due Process Clause the "protection of the individual from arbitrary action".

ARGUMENT

POINT I

We respectfully submit, as to each of these petitioners separately, that there was no evidence that any act of violence was with his encouragement or concert; and that his conviction and sentence were, in consequence, denials of his liberties under the due process clause of the Fourteenth Amendment.

(1) As already said, the decisive question as to each of these petitioners is, in our view, the very question left open by this Court in *Cole* v. *Arkansas*, 338 U. S. 345, namely (p. 352):

> "whether a state has power to incriminate by his mere presence an innocent member of a group when some individual without his encouragement or concert commits an act of violence."

The Virginia statute, somewhat like the Arkansas statute considered in the *Cole* case, expressly requires much more than mere presence in a group, one or several members of which uses force or makes threats of violence or utters insulting or threatening language, with the purpose of interfering with another in the exercise of his right to work. The statute recognizes the right to conduct a peaceful strike or picket line.

The conditioning words in the statute are "*singly or in concert with others*". Conscious performance, or conscious participation in performance, of the forbidden acts is the express prerequisite of guilt.

(2) In the present case, therefore, we start with the concessions made by the Trial Court itself (R. 378-380):

> "Nobody could see who threw the rocks, but they came out of the crowd. They came from that direction. • • • Not any serious damage done to anybody fortunately. • • •
>
> This action stopped as soon as the mill shut down, everything became quiet and peaceful, as far as an incident of this kind was concerned. • • •
>
> 40 of those present have been identified. All of them were on strike either from that mill or from other mills. They all belonged to the Union, which was perfectly all right. They all had a common interest in the outcome of the strike."

Henry D. Cumbia, the Superintendent of the mill and a chief witness for the prosecution, testified on direct examination that the Sheriff and the police troopers arrived in about thirty minutes after being summoned by telephone; that after the Sheriff arrived no more rocks were thrown; that the picket line "just stood there just like they were in a meeting"; that the picket line and the group went away when the Sheriff spoke to them; that the men in the mill had continued to work; and that the mill itself resumed when the Sheriff came (R. 57-62; 103-4, 110).

The prosecution's witnesses differ as to the number of rocks thrown. Some saw none, several said one, and several estimated from four to eight (R. 203-4, 121-2, 143, 151, 173, 186-8, 194, 103-16).

The Trial Court apparently drew the inference that, although the right to strike, assemble and maintain a picket line was conceded, nevertheless the common interest and assembly thereby entailed was proof "of a common purpose" on the part of all there "to induce those at the mill

to quit their work by threats, insulting language, by throwing rocks and by menacing gestures", with the further consequence that all who were there, by the very fact of being there, were concertedly committing "the unlawful acts" (R. 379, 380).

The only defendant whom the Trial Court acquitted was Willie E. Price. The only reason given was that he was not there "at the time" (R. 381).

(3) The wholesale consequence of this view of guilt by presence was highlighted when the Trial Court came to impose fines and jail sentences *on some thirty individuals* whom the Court described as "the sheep of the flock" (R. 383-4).

Notwithstanding that the highest estimate by any witness did not exceed eight rocks and no one identified any rock thrower, the Trial Court said (R. 383):

> "The following are what I would call more or less the sheep of the flock. Some of them evidently threw stones and did things that are not identified and they are" (naming them).

The Court also referred to the "sheep" as "blindly following the leaders" (R. 380).

Obviously, this was sentencing thirty people to jail for doing *"things that are not identified"* and which no one testified that any identified person did. No one testified that any person among "the sheep" threw stones.

Thus, the case comes to this: There was a lawful strike, a lawful picket line and a lawful assembly of persons who had a lawful right to assemble in connection therewith.

In the group, and during a brief period, several unidentified persons threw several rocks, and several allegedly

used insulting language. Therefore, so the theory seems to run, all present were guilty and sentenced to jail, notwithstanding that the entire group soon peaceably dispersed.

Such reasoning would, we respectfully submit, automatically impute guilt to every person in a picket line or in an assembly in connection with a strike, where for some minutes several persons in the group did or uttered something unlawful.

Such is not the law. Directly in point is *National Labor Relations Board* v. *Deena Artware*, 198 F. 2nd 645 (U. S. C. A. 6), cert. den. 345 U. S. 906, where, from a large group of strikers there came missiles and insulting language, and yet the court held (p. 652):

> "But unauthorized acts of violence on the part of individual strikers are not chargeable to other Union members in the absence of proof that identifies them as participating in such violence."

(4) Our courts have never accepted, and under the Due Process Clause they never could accept, the alien doctrines of guilt by association or on suspicion or conjecture.

Under the Due Process Clause, criminal guilt is a purely personal matter. No one can be deprived of liberty for isolated acts by another unless there is proof beyond a reasonable doubt that he intentionally concerted with the doer in the doing thereof.

Nor is the "liberty" of the Due Process Clause merely the liberty not to be criminally convicted and jailed except by due process of law. It is the mother clause in the whole Bill of Rights. It embraces all the other guaranteed freedoms,—the liberties of speech, press, religion, assembly, work or stoppage of work, property, franchise, etc. No one of these liberties can be struck down by any

agency of the State, executive, legislative or judicial, save by due process of law.

> *DeJonge* v. *Oregon*, 299 U. S. 353, 364;
> *Gitlow* v. *New York*, 268 U. S. 652, 666.

In enforcing the Due Process Clause "this Court is not bound by the conclusions of the lower courts, but will reexamine the evidentiary basis on which those conclusions are founded" (*Niemotko* v. *Maryland*, 340 U. S. 268, 271).

Hence, the Due Process Clause is operative even though the state agency may be the judicial department of the State. (*Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226, 234-5.)

In *Thornhill* v. *Alabama*, 310 U. S. 88, this Court said (p. 105):

> "But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."

Nor did the fact, if it be a fact, that other workers on strike against other mills in the same industry and neighborhood were present, constitute an illegality, much less a crime. As this Court said in *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 296:

> "But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' *A. F. of L.* v. *Swing*, 312 U. S. at 326."

POINT II

Rejection of the theory that mere presence in the group made every member of it criminally responsible for any unlawful act by any other member, strips the respective convictions of any basis in due process of law.

A

In now proceeding to analyze the so-called evidence as to each of these petitioners separately condemned to imprisonment, certain principles are basic, namely:

(1) Criminal guilt is personal. The prerequisite is personal overt action either directly or in assistance. The Due Process Clause excludes criminal guilt by mere association or imputation.

(2) Not only the Due Process Clause but the Virginia Statute itself requires, where the indictment is for unlawful action "in concert", that personal unlawful *action* be proven,—namely, personal acts which unlawfully "interfere", or unlawfully "use", or unlawfully "engage in" any of the overt conduct forbidden. Mere presence is not either personal unlawful action or the overt conduct forbidden.

(3) The Due Process Clause as well as our traditional concept of liberty under law require an adequate evidentiary basis for an imprisonment. Otherwise, a federal constitutional right, although not denied by a state court in express terms, could effectually be denied by a finding made without adequate evidentiary basis in terms of the federal right. (*Norris* v. *Alabama*, 294 U. S. 587, 589-590.)

(4) It is elementary that, in a criminal case, circumstances of suspicion or conjecture are never proof of guilt.

B

We begin by taking those of the petitioners whom the Trial Court characterized as "the sheep of the flock" (R. 383),—a phrase in itself suggestive of a concept that "the sheep" should be sentenced to imprisonment for the misbehavior of the supposed shepherds.

Mark Stith

Raney, one of the workers, Cumbia, the superintendent, and Wiley, the operator of the mill store, saw Stith in the group (R. 150, 61, 241). Cumbia testified that Stith stopped at the west end of the boxcar with Daugherty, Cleveland Stith and Price, and (R. 54-5):

> "Mark Stith was giving them a signal like this (Indicating by beckoning with hand), but he didn't say anything". • • •
>
> "Nobody paid any attention, or said anything. Just let him stand there and wave his arms".

In sentencing him the Trial Court said (R. 383):

> "Mark Stith, waiving the picketers on, a $50.00 fine and six months". (The Court suspended three months of the sentence for three years (R. 385).)

There was no evidence that Mark Stith was an officer of the Union. He was just one of "the sheep". He seems to have been sent to jail for making with his hand a beckoning gesture to which no one paid any attention.

Since, concededly, the strike and forming a picket line were lawful (R. 376), how did Mark Stith lose his constitutional liberty of "beckoning" with his hand, even if we accept the Trial Court's addition to the testimony

and accept its description of the gesture as "waiving the picketers on"?

The Virginia statute does not purport to be a strike-breaking statute or to be prohibitive of picketing. If it did, it would be an unconstitutional denial of the liberties of speech, communication and assembly. Yet, we respectfully submit, the interpretation and the application of it by the Trial Court in sentencing Mark Stith to prison, have in his case effectually impaired those very liberties, and have made of the Statute a ready and constant means of intimidating the exercise by workers and labor unions of their traditional means of seeking betterment in employment, of recruiting membership, and of communicating their case to the public.

Such interpretation and application of law would be intimidating notice in advance to every one in or near the picket line or in any assembly of strikers near the struck property that his mere presence placed him in jeopardy of jail if anyone else should use language which could be interpreted as insulting or making some threat.

There would scarcely be a more effective means of crippling labor unions and impairing exercise by their members of constitutional rights than an adoption, openly or by indirection, of the doctrine of guilt by association.

If "beckoning" to some unidentified person and receiving no attention can entail imprisonment because another unidentified person throws a rock, then a picket line or an assembly in the neighborhood to discuss a strike is a place to shun, and puts every one at penal hazard of an unlawful act or tough word by some unidentified person also present. Immediate flight from the scene becomes urgent in order to escape the risk of indictment and imprisonment because of mere presence.

Indeed, that very concept of the law seems to have been in the Trial Court's mind, for, in the course of rendering his verdict, the Court said (p. 379):

> "No one in the crowd turned off and left and went away because it was getting too rough."

But, even assuming *arguendo* a failure on the part of Mark Stith to withdraw immediately when a rock was thrown or when a tough word was spoken, and that such failure would in itself be a sort of negative action "in concert", there nevertheless is no evidence that Mark Stith saw any rock-throwing or heard any abusive language. Even some of the prosecution's own witnesses admitted that they did not see any rocks thrown at all or saw only one (R. 203-4, 151, 173, 121-2, 143). And, as already stated, the entire group dispersed and peaceably left as soon as the Sheriff requested them so to do (R. 62, 250-3).

Ambrose Stith, Jr.

Ambrose Stith, Jr. was identified as a member of the group by one of the workers, John Aldridge (R. 185), and by Cumbia, the superintendent (R. 61).

Stith, in company with Eugene and William B. Stith, started up the steps of the retaining wall when the group first congregated, "stood there a minute or two, then turned around and went back to the railroad" (R. 51, 72).

Without comment, the Court fined him $50.00 and sentenced him to six months in jail (R. 382). Three months of the sentence was suspended for three years (R. 385).

Thus, this man was jailed just for being there.

Eugene Stith

Eugene Stith was identified as a member of the group by five of the workers in the mill and by others (R. 105, 130, 147, 185, 203, 51, 224, 241).

Stith, his brother, W. B. Stith, and Ambrose Stith, Jr., started "walking" up the steps of the retaining wall alongside the mill when the group first came down the main line track; but when Daugherty held up his hand for them "to stop", they "stood there a minute or two, then turned around and went back to the railroad" (R. 51). Stith was "very well intoxicated" (R. 130-1).

In sentencing Stith, the Court said (R. 382):

> "Eugene Stith, another aggressive leader, started on the property, I find him guilty and fix his punishment as a fine of $50.00 and six months." (The Court suspended three months of the sentence for three years (R. 385).)

A man who retreated after "a minute or two" and upon a warning gesture by another, was scarcely "an aggressive leader." He was not on trial for being drunk or for a momentary and hastily corrected trespass to the extent of several feet on a twenty-five acre property.

William B. Stith

William B. Stith was identified as a member of the group by five workers in the mill and others (R. 51, 61, 105, 118, 150, 185, 203, 241).

When the group first congregated at the plant, Stith, in company with his brother, Eugene Stith, and Ambrose Stith, Jr., started up the steps of the retaining wall, "stood

there a minute or two, and then turned around and went back to the railroad" (R. 51).

In sentencing him the Court said (R. 382):

> "William B. Stith, another one who was aggressive, who started up there apparently intoxicated, upon the property, a $50.00 fine and six months in jail." (The Court suspended three months of the sentence for three years (R. 385).)

We are unable to find any testimony that this man was drunk or "intoxicated".

Even if a hesitant going up several steps of a stairway from the railroad's property to the mill property could by any fair appraisal be deemed "aggressive", his immediate retreat was by action and example a warning to the group to avoid aggression and to keep off the mill property.

It was no criminal offense to be on the railroad property, and he was not indicted for being there, or for momentarily stepping a few feet on the mill property consisting of twenty-five acres. He was an employee of the mill.

Ambrose Stith, Sr.

Ambrose Stith, Sr. was identified as a member of the group by two of the workers in the mill and by others (R. 53, 61, 150, 203, 225, 241).

Cumbia, the Superintendent, testified that Stith was standing on railroad property between the mill and the boxcar on the spur track, and that from there Stith "hollered" to him to stop the mill, but "I paid no attention to him" (R. 50, 53).

Only six of the nine workers named in the indictment as being interfered with in their right to work, testified. None of them testified to hearing the alleged remark.

In sentencing Stith the Trial Court said (R. 382):

> "Ambrose Stith, Sr., another one who was an aggressive leader, the one who hollered to stop the mill —and the court has observed all these people, not all, all didn't testify, but Ambrose Stith did, and I observed him on the witness stand. $50.00 fine and six months in jail." (The court suspended three months of the sentence for three years (R. 385).)

We cannot find in the prosecution's case any testimony that even suggested aggressiveness or leadership on his part. An impulsive call to stop the mill by one on the picket line was rightly assessed by the superintendent of the mill as not to be given attention.

As said by this Court in *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 296:

> "Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing".

Cleveland Stith

He was referred to by some of the witnesses as Clayton Stith (R. 105, 203). He was one of those carrying a picket sign, and was pacing up and down with it.

Cumbia, the superintendent, testified (R. 55):

> "I believe once that I heard this Cleveland Stith say, 'You all come on here',"

directing the remark to the men in the mill. Cumbia admitted he heard no one else say that (R. 55). None of the men in the mill testified that he heard any such remark.

We submit that under the Freedom of Speech Clause as well as the Due Process Clause such a remark, if made, could not be a crime.

Raney testified that some were hollering and pointing their fingers, and he noticed one in particular, Clayton Stith, who was pointing his finger at the men in the mill (R. 149). He admitted he did not hear what was said (R. 149).

In sentencing Stith, the Court said (R. 383):

> "Cleveland Stith—Cleveland was everywhere all the time, up at the front, calling them out, shaking his fingers, and I think if anybody who saw him and they were to observe could easily see he was anything other than pleasant, he was arrogant, defiant, during the whole matter, that was his attitude entirely, I fine him $250.00, and six months."

We can find no testimony for the characterizations thus uttered by the Trial Court. Pointing with a finger is a different thing than shaking a fist. Being in the group is a different thing from being "everywhere all the time". Calling to the men in the mill "to come on here" is a different thing from being "arrogant, defiant".

Strikes and picket lines cannot be conducted if those engaged therein can be jailed if "other than pleasant."

Strikes and picket lines are for the very purpose of applying economic pressure,—a form of pressure which the Constitution recognizes as the right of both employer and employee. The employer can refuse economic betterment. He is not a criminal, and cannot be made such, even if, in so doing, he is not "pleasant" and is "arrogant, defiant." There is probably no place where tough language is more frequent than around the table in collective bargaining.

The law's test is the absence of breach of the peace.

Here there is no evidence that Cleveland Stith committed a breach of the peace or urged others to do so. By pointing his finger at the men in the mill, he indicated to them that his call to "come on here" was directed to them.

Such words are every day occurrence in a strike and a picket line. And, as here, the absence of any attention thereto is also every day occurrence.

No one heretofore has assumed that the Bill of Rights would permit jail as a means for suppression of such words or as a means for enforcing a "pleasant" demeanor.

Stith denied that he saw any one throw a rock, or that he threw any himself (R. 297-8). No one contradicted him. He also testified that while he was there two trains passed; that he had never been on a strike before; and that he was not an officer of the Union (R. 300-3).

Curtis Coleman

In sentencing Coleman the Court said (R. 383):

> "Curtis Coleman, the one who had this iron bar or scrap in his hand, who didn't put it down until the officer ordered him to do it, a $50.00 fine and six months." (The Court suspended three months of the sentence for three years (R. 386).)

Washburn, a deputy sheriff, testified that, after he arrived, the only striker he talked to was Coleman (233).

His testimony was, in substance (R. 254-256): Coleman was standing on the track with a piece of flat iron in his hand. When Washburn asked him what he was going to do with it, he said he picked it up down the track. Coleman dropped it on the track when Washburn told him to move

off. The piece was about an inch wide and a yard long. Coleman was holding it down in his hand. He was out in front of the crowd.

Coleman testified that he had arrived only 15 or 20 minutes before the police officers; that he had his back to the mill; that there was a picket line; that at that spot Forrest and Rufus Trotter were walking in the picket line, Forrest carrying the sign; that the iron referred to was the usual flat bendable band, used for banding lumber; that he had picked it up as he walked along the track; and that he put it down when the officer told him to (R. 334).

No one testified that Coleman did or said any unlawful thing. He obeyed the officer at once. No one testified that he had made any threatening gesture with the band, or that he had urged any one to do any unlawful act, or that he had gone on the mill property.

None of those employees named in the second count as having been interfered with testified that they had even seen the band.

We respectfully submit that unless the traditional safeguards for liberty imposed by the Bill of Rights are to be nullified by tolerated judicial negation, Coleman could not be condemned to fine and jail.

John M. Price

Cumbia, the superintendent, testified that Price was on the railroad property, facing the mill, and "hollering" at the men, "You all are no God damned white man". He said it a dozen times (R. 54).

Wilkinson, a worker, testified on cross examination that when he turned to face the workers, after a rock was

thrown, Price, who was "standing still", said to him, "No use for you to look so mean and mad about it"; and that at the time "other people were making noise, laughing and talking", among themselves "scattered over an area of 100 yards up and down the railroad" (R. 135, 139, 146).

In sentencing Price, the Court said (R. 382):

> "John M. Price, one of the most aggressive of all of them, the one that did the cursing, who made the remark 'You all ain't no God damned white man', or words to that effect, then told Mr. Wilkinson 'No use for you to look so mean and mad,' $250.00 fine and six months."

The language was unpleasant and unrefined, but it was language only. The union had been certified as the bargaining agent but no agreement had been reached and a strike had resulted. Bad feeling was inevitable, particularly if the white men kept the jobs and the Negroes had the burden of carrying the strike.

Profanity is always deplorable; but we know of no decision holding that, notwithstanding the constitutional right to strike and picket, loss of that right and loss of liberty can be the penalty for its use.

Leroy Parham

Cumbia, the mill superintendent, testified that Parham was one of the group on the railroad, and that he was sitting on the track "piling up a little pile of rocks" (R. 52).

Save for testimony by others merely identifying Parham as present (R. 150, 241), there seems to be no other specific reference to Parham.

Without comment the Trial Court sentenced him to "a $50 fine and six months", of which three months was suspended for three years (R. 383, 386).

There is, we submit, not a particle of testimony that Parham did or said anything unlawful. Indeed, there is no testimony that he said anything at all to anybody.

E. R. Daugherty, Jr.

Daugherty was employed by the Eastern District Council of Carpenters of Virginia, a union organization within the United Brotherhood of Carpenters and Joiners of America, A.F.L. His employment was to represent Local Union 2518 in negotiating a contract with C. H. Perkinson Lumber Company. He had been a member of the Brotherhood for over eleven years (R. 350).

Cumbia, the mill superintendent, testified that Daugherty was standing at the end of the box car opposite to the end where Cumbia said he saw the rock thrown from. To quote (R. 58, 59):

> "Q. Anyway, he was at the opposite end of the car from where the rocks were being thrown?
>
> A. For the ones I saw thrown. * * * *I doubt if he could exactly tell who throwed it from where he was standing.*"

Concerning Daugherty's relationship to the picket line, Cumbia testified (R. 79):

> "I saw him walking with them, whenever I was around there. * * * He usually walked along, maybe one on each side of him. * * * Never hardly a big bunch when they were walking."

Wilkinson, one of the employees, testified that he saw Daugherty "walking with them, picketing just as the rest of them were" (R. 125).

Raney, another employee, testified that Daugherty "would go out there and walk with them and they were walking and he would carry the sign with them and so forth" (R. 155). Raney further testified (R. 156-7):

> "Q. Generally how large would the picket line be, or how large was the picket line from time to time while Mr. Daugherty was there?
>
> A. Started out until they went on strike, until they went on strike, is that what you mean? All the men didn't go out on strike. Some few did not. They would walk around, just walk in the road that day. They didn't cause any trouble."

And Raney further testified (R. 159-160):

> "Q. How did you arrive at the conclusion that on Thursday they seemed to be getting madder and madder? Will you describe to the Judge the reason why you reached that conclusion?
>
> A. Just the way they acted. I mean, just the way they acted. Then on Friday morning they had to go and bring in all these other men. I reckon they brought them in. They were there. Who they were I don't know.
>
> Q. But they were strangers?
>
> A. Looked to me like they were strangers and trying to show force or something. I don't know what they were doing.
>
> Q. All the people whose names that you have called and identified as being in the picket line that Friday morning were employees of C. H. Perkinson that were out on strike?
>
> A. Yes, sir."

The hearsay and conclusory character of much of this testimony is obvious.

According to the police officers, Daugherty told them after they arrived that he knew nothing about the throwing of rocks; that he turned and asked the members of the group if they knew anything about it; that he had no audible response (R. 245-6, 251).

Officer Hill stated that he told Daugherty that he had orders not to permit the strikers to be on the Company's property or on the railroad property; that Daugherty replied "we will get off"; and that thereupon he moved off with others of the group (R. 245-7).

Concerning the same incident State Trooper Downey testified (R. 251):

> "I asked him (Daugherty) what kind of trouble they had down there that morning. He stated first he knew of any trouble, as far as he knew there hadn't been any trouble.
>
> I told him about the complaint we had received about the rock throwing incident. He said he knew nothing about any rocks being thrown down there, he didn't see any thrown, and as far as he knew there weren't any rocks thrown.
>
> He turned around and asked some of the men there 'Has anybody thrown any rocks down here, or seen anybody throw any rocks?' I don't believe he got an audible answer from the crowd. I don't recall any.
>
> Q. Then they were ordered to get off the track?
>
> A. Yes, sir. Ordered to disperse. Some went one way and some went another."

And again (R. 252):

> "Q. Did he (Daugherty) comply with your request to disperse the crowd when you asked him to do so?
>
> A. Yes, sir.

Q. Did he make any protests at all?
A. No, sir, none whatsoever.

By the Court:

Q. Did he tell them to disperse?
A. I believe they were all gathered around. When we told them to disperse I don't recall him turning around and saying 'All right, let's leave.' He said 'We will leave, we are leaving.'
Q. He said 'We are leaving'?
A. Yes, sir.

By Mr. Hammack: (Continued)

Q. And they did leave?
A. Yes, sir."

In sentencing Daugherty, the Trial Court said (R. 381-2):

> "E. R. Daugherty, Jr. I would say he was the shepherd of the flock. He was there leading as little children to keep them out of pitfalls, but he was leading them into pitfalls. I fix his punishment at a fine of $250.00 and six months in jail."

There is, we respectfully submit, no testimony that Daugherty "was leading them into pitfalls". He was conducting the picket line, and, indeed, was so careful to avoid any one trespassing on the mill property that even Cumbia testified that when some of the men started up the steps by the retaining wall, he held up his hand and called them back (R. 51). He led the men off even the railroad property when the police officers so requested. No one has testified that he used violent language or uttered threats to anyone. His conviction was, we submit, wholly arbitrary and a violation of the liberties guaranteed by the Due Process Clause.

Conclusion

The petition for a writ of certiorari as prayed for should be granted.

Respectfully submitted,

CHARLES H. TUTTLE
BEECHER E. STALLARD
FRANCIS X. WARD
Of Counsel for Petitioners

STALLARD & KEENE
Central National Bank Building
Richmond 19, Virginia
Attorneys for Petitioners

APPENDIX A

Judgment of the Circuit Court

VIRGINIA: IN THE CIRCUIT COURT FOR BRUNSWICK COUNTY

August 18, 1955

Commonwealth

vs.

Indictment for Felony and 2 Counts for Misdemeanor Case #5

James Barnes and Others

(Write All Names When Spread on Book)

This day came again the Attorney for the Commonwealth and came also James Barnes, Morgan Branson, Emmett Brown, Curtis Coleman, David Leon Cook, James Melvin Davis, E. R. Dougherty, Jr., Eddie Lewis Drummond, George Edmunds, Obediah Elder, Robert L. Elder, Robert T. Elder, Leon M. James, Pharoah Johnson, Waverly Kinchen, Osborne Marshall, John Merrit, Levi Merrit, Leroy Parham, Richard Peterson, John M. Price, Willie E. Price, Charlie Short, Rufus Smith, Ambrose (Ambress) Stith, Jr., Ambrose (Ambress) Stith, Sr., Cleveland Stith, Eugene Stith, Herbert Stith, Mark W. Stith, Solomon Stith, Jr., William B. Stith, Forrest Trotter, Melvin Trotter, George Hammack Sturdivant, Henry Tucker, William Tucker, W. I. Thomas, Roman Clarence Wyatt, Lester Williams and Hurley Yates, and came also counsel for the respective parties. And the Court having heard argument of counsel and having fully

considered the evidence introduced on behalf of the Commonwealth and the defendants doth find each of the defendants not guilty of the felony charge in the first count of the indictment and each of them are hereby discharged of the felony charged in said indictment and ordered to go thereof without day.

And the Court doth find the defendant Willie E. Price not guilty of the charge contained in the second and third counts of the said indictment, and accordingly he is ordered to go thereof without day.

And the court doth find the defendant E. R. Dougherty, Jr., guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $250.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court that the said E. R. Dougherty Jr., be confined in the jail of this county for the term of six months and that the Commonwealth of Virginia do recover against the said E. R. Dougherty Jr., the sum of $250.00, the fine aforesaid in form aforesaid assessed together with its costs about its prosecution in this behalf expended.

And the Court doth find the defendant Eugene Stith guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the court that the said Eugene Stith be confined in the jail of this County for the term of six months and the Commonwealth of Virginia do recover against the said Eugene Stith the sum of $50.00, the fine aforesaid in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant William B. Stith guilty as charged in the second count in said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is ac-

cordingly the judgment of the court and the sentence of the Court that the said William B. Stith be confined in the jail of this County for six months and that the Commonwealth of Virginia, do recover against the said William B. Stith the sum of $50.00, the fine aforesaid in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Ambrose (Ambress) Stith, Sr. guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the Court and the sentence of the Court that the said Ambrose (Ambress) Stith, Sr. be confined in the jail of this county for the term of six months, and that the Commonwealth of Virginia do recover against the said Ambrose (Ambress) Stith, Sr. the sum of $50.00 the fine aforesaid in form aforesaid assessed together with its cost by it about its prosecution in this behalf expended.

And the Court doth find the defendant Ambrose (Ambress) Stith Jr., guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in the jail for the term of six months. It is accordingly the judgment of the court and the sentence of the Court that the said Ambrose (Ambress) Stith, Jr. be confined in the jail of this county for the term of six months and that the Commonwealth do recover against the said Ambrose (Ambress) Stith, Jr., the sum of $50.00 the fine aforesaid in form aforesaid assessed, together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant John M. Price, guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $250.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the

Court that the said John M. Price be confined in the jail of this county for the term of six months and that the Commonwealth of Virginia do recover against the said John M. Price the sum of $250.00, the fine aforesaid, in form aforesaid assessed, together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Mark W. Stith guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the court that the said Mark W. Stith be confined in the jail of this County for the term of six months and that the Commonwealth of Virginia do recover against the said Mark W. Stith the sum of $50.00, the fine aforesaid in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Leroy Parham guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the Court and the sentence of the Court that the said Leroy Parham be confined in the jail of this County for the term of six months and that the Commonwealth of Virginia do recover against the said Leroy Parham the sum of $50.00, the fine aforesaid, in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Cleveland Stith guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $250.00 and confinement in jail for the term of six months. It is accordingly the judgment of court and the sentence of the court that the said Cleveland Stith be confined in the jail of this county for the term of six months and that the Commonwealth of Virginia do recover against the said Cleveland Stith the sum of $250.00, the fine aforesaid, in form

aforesaid assessed together with its costs about it about its prosecution in this behalf expended in this Court.

And the Court doth find the defendant Curtis Coleman guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in the jail for the term of six months. It is accordingly the judgment of the court and the sentence of the court that the said Curtis Coleman be confined in the jail of this county for six months and that the Commonwealth of Virginia do recover against the said Curtis Coleman the sum of $50.00 the fine aforesaid, in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendants James Melvin Davis, Obediah Elder, Robert L. Elder, Robert P. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charles Short, George H. Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook guilty as charged in the second count of said indictment and doth fix the punishment of each of them at a fine of $25.00 and confinement in jail for the term of three months. It is accordingly the judgment of the court that the Commonwealth of Virginia do recover against James Melvin Davis, Obediah Elder, Robert L. Elder, Robert T. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charlie Short, George Hammack Sturdivant,

Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook the sum of $25.00 each, the fine aforesaid, in form aforesaid assessed against each of them, together with its costs by it about its prosecution in this behalf expended, and that the said James M. Davis, Obediah Elder, Robert L. Elder, Robert T. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charlie Short, George Hammack Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook be and they are each hereby sentenced to confinement in the jail of this county for the term of three months and that they and each of them remain in jail until said fine and costs be paid.

And it appearing to the court that it is compatible with public interest so to do, it is ADJUDGED AND ORDERED that execution of three months of the jail sentence of six months imposed upon Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Sr., Ambrose (Ambress) Stith, Jr., Mark W. Stith, Leroy Parham and Curtis Coleman, by the judgments aforesaid, be and the same is hereby suspended for a period of three years from this date, upon condition that they, and each of them, pay the fine and costs assessed against them, by the judgment aforesaid and upon further condition that they and each of them shall keep the peace, be of good behavior and not violate any of the laws of the State of Virginia or any political subdivision thereof, during said period of three years.

And it is further ordered that execution of the three months jail sentence imposed by the judgment aforesaid against James Davis, Obediah Elder, Robert L. Elder, Robert T. Elder, Pharoah Johnson, John Merrit, Levi Mer-

rit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charlie Short, George Hammack Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook, be, and the same are hereby suspended for a term of three years from this date upon condition that they, and each of them, pay the fine and costs assessed against them by the judgment aforesaid and upon the further condition that they and each of them be of good behavior, keep the peace, and not violate any of the laws of the Commonwealth of Virginia or any political subdivision thereof during the term of three years.

Whereupon the defendants E. R. Dougherty, Jr., Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Jr., Ambrose (Ambress) Stith, Sr., John M. Price, Mark W. Stith, Leroy Parham, Cleveland Stith and Curtis Coleman, by counsel, moved the court to set aside the judgment entered against each of them on the grounds stated on yesterday in their motion to strike the evidence and on the further grounds that the accused are being denied their liberties under the due process clause of the 14th Amendment of the Constitution of the United States and the constitution of the State of Virginia, which motion the court doth overrule, and to the action of court in overruling said motion, each of said defendants, by their counsel, excepted.

And the defendants E. R. Dougherty, Jr., Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Sr., Ambrose (Ambress) Stith, Jr., John M. Price, Mark W. Stith, Leroy Parham, Cleveland Stith, and Curtis Coleman, by counsel, having indicated their intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to the judgments rendered against them, and each of them, on motion of said defendants, by their counsel, it is ordered

that execution of the judgments pronounced against these said defendants be and the same is hereby suspended until October 25, 1955 in order that they may apply for a writ of error to the judgments rendered against them as aforesaid.

Whereupon E. R. Dougherty, Jr., together with George L. Nalls, his surety, who justified on oath as to his sufficiency acknowledged themselves indebted to the Commonwealth of Virginia in the sum of $1000.00, upon condition that the said E. R. Dougherty, Jr., shall make his personal appearance before this court on October 25, 1955, at 10 o'clock A. M. to submit to the judgment of the Court and to abide such further action of the court in the premises as may be necessary and proper and in the meantime that the said E. R. Dougherty, Jr., shall keep the peace, be of good behavior and not violate any of the laws of the State of Virginia, or any of the political sub-divisions thereof and that he shall not depart without the leave of this court.

And the defendants Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Sr., Ambrose (Ambress) Stith, Jr., John M. Price, Leroy Parham, Cleveland Stith, and Curtis Coleman, together with George L. Nalls, their surety, who justified on oath as to his sufficiency, each, jointly and separately recognized themselves to be indebted to the Commonwealth of Virginia for the sum of $500.00 each, upon condition that the said defendants and each of them shall make their personal appearance before this Court on October 25, 1955 at 10 o'clock A. M. and submit to the judgment of the Court and abide such further action of the court in the premises as may be necessary and proper, and not depart without leave of court, and in the meantime to be of good behavior, keep the peace, and not violate any of the laws of the Commonwealth of Virginia, or any political sub-division thereof.

And the defendant Mark W. Stith not being in Court, on motion of his counsel he is allowed until August 22, 1955

to give a recognizance, with surety approved by the Clerk of this Court, in the sum of $500.00 for his appearance on October 25, 1955 to submit to the judgment of this Court etc.

And the Court doth find each of the defendants named in the third count of the indictment, they being the same persons whose names are set forth in the caption of this order, not guilty, of the misdemeanor charged in the third count of said indictment, and they, and each of them are hereby ordered to go thereof without day.

Chy. Order Book
22 Page 352

A Copy Teste:

M. H. Turnbull *Clerk*
By Willie B. Abernathy *Deputy Clerk*

APPENDIX B

Memorandum of Affirmance by the Supreme Court of Appeals

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday *the* 18th *day of* January, 1956.

The petition of E. R. Dougherty, Jr., Eugene Stith, William B. Stith, Ambrose Stith, Sr., Ambrose Stith, Jr., John M. Price, Mark Stith, Leroy Parham, Cleveland Stith and Curtis Coleman for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Brunswick County on the 18th day of August, 1955, in a prosecution by the Commonwealth against the said petitioners for a felony and misdemeanors, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Circuit Court.

A Copy, Teste:

H. G. TURNER
Clerk

(SEAL)

APPENDIX C

Constitution of the United States

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Statute

(Code, 1950)

"§40-64. *Preventing persons from pursuing lawful vocations, etc.; illegal picketing; injunction.*—No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person to induce or attempt to induce him to quit his employment or refrain from seeking employment.

No person shall engage in picketing by force or violence, or picket alone or in concert with others in such manner as to obstruct or interfere with free ingress or egress to and from any premises, or obstruct or interfere with free use of public streets, sidewalks or other public ways.

When a strike or lockout is in progress, no person who is not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and punished accordingly.

Notwithstanding the punishments herein provided any court of general equity jurisdiction may enjoin picketing prohibited by this section, and in addition thereto, may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder, restrain coercion, protect life or property, or promote the general welfare. (1946, p. 392; Michie Suppl. 1946, §4711a; 1952, c. 674.)"

In the

Supreme Court of the United States

October Term, 1955

No. 856

COMMONWEALTH OF VIRGINIA,

Respondent

v.

E. R. DAUGHERTY, JR., EUGENE STITH, WILLIAM B. STITH, AMBROSE STITH, SR., AMBROSE STITH, JR., JOHN M. PRICE, MARK STITH, LEROY PARHAM, CLEVELAND STITH AND CURTIS COLEMAN,

Petitioners

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

May 10, 1956

TABLE OF CONTENTS

Page

I. Statement of the Case and the Proceeding Below 2

II. The Questions Presented 6

III. Argument 7

The Decision of the Circuit Court of Brunswick County Rested on a Non-Federal Ground, Therefore, This Honorable Court Does Not Have Jurisdiction to Hear This Case 7

IV. Conclusion 13

Appendix A — Statutes Involved 14

Appendix B — Judgment of the Circuit Court 16

Appendix C — Memorandum of Affirmance by the Supreme Court of Appeals 25

TABLE OF CITATIONS

Cases

Adkins v. Commonwealth, 175 Va. 590, 9 S. E. 2d 349 9

Boggs v. Commonwealth, 153 Va. 828, 149 S. E. 445 ..... 8, 9

Brown v. Commonwealth, 130 Va. 733, 107 S. E. 809, 16 A. L. R. 1039 ..... 8, 9

Cole v. Arkansas, 338 U. S. 345 12

Page

Copperweld Steel Corporation v. Industrial Commission, 334 U. S. 780 7

Foster v. Commonwealth, 179 Va. 96, 18 S. E. 2d 314 8

Hedgebeth v. North Carolina, 334 U. S. 806 7

Hodge v. Winchester, 153 Va. 904, 150 S. E. 392 ..... 8, 9

Howat v. Kansas, 258 U. S. 181 7

Hurd v. Commonwealth, 159 Va. 880, 165 S. E. 536 ..... 8, 9

James v. Commonwealth, 178 Va. 28, 16 S. E. 2d 296 8

McCoy v. Shaw, 277 U. S. 302 7

Rasnake v. Commonwealth, 135 Va. 677, 115 S. E. 543 9

Shiflett v. Commonwealth, 151 Va. 556, 145 S. E. 336 8

Spradlin v. Commonwealth, 195 Va. 523, 79 S. E. 2d 607 9

Stembridge v. Georgia, 343 U. S. 541 7

United States v. Peoni, 100 F. 2d 401 9

Watts v. Commonwealth, 99 Va. 872, 39 S. E. 706 9

Wooden v. Commonwealth, 117 Va. 930, 86 S. E. 305 9

Statutes

Code of Virginia:

Section 18-3 9

Section 18-38 5

Section 18-210 ..... 5, 6

Section 40-64 ..... 6, 7, 12, 13

In the

Supreme Court of the United States

October Term, 1955

No. 856

COMMONWEALTH OF VIRGINIA,
Respondent

v.

E. R. DAUGHERTY, JR., EUGENE STITH, WILLIAM B. STITH, AMBROSE STITH, SR., AMBROSE STITH, JR., JOHN M. PRICE, MARK STITH, LEROY PARHAM, CLEVELAND STITH AND CURTIS COLEMAN,
Petitioners

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondent, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this Court and, further, the lack of substance in the questions presented by this petition, files this brief in opposition to the petitioners' petition for writ of certiorari. The respondent includes herein its opposition to the petition for writ of certiorari on the ground that the decision below was not rested on a federal question. The matters here relied upon are more particularly stated below.

I.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

On the morning of June 3, 1955, two groups of men approached the C. H. Perkinson Lumber Company in Brunswick, Virginia. One group came from the east along the Virginian Railroad tracks and the second group approached from the west along the tracks. The land of the Lumber Company consisted of some 25 acres, triangular in shape, and bounded by State Highway 712, State Highway 634, a private road, and the tracks of the Virginian Railroad.

A strike had commenced at the C. H. Perkinson Lumber Company on May 31st, 1955. The plant did not suspend operations on account of the strike, but continued with those employees who did not strike, supplemented, primarily, with additional help that normally worked in the woods cutting the timber and hauling the lumber to the plant (R. 207). The strike and accompanying picketing continued from its inception until after the time under consideration.

The two groups met opposite a box car on the railroad tracks and stopped (R. pp. 149, 183, 184). The whole groups were estimated at 30-35 (R. p. 113), 40-50 (R. pp. 118, 244), 35-40 (R. p. 250), 40 (R. p. 258), 45 or more (R. p. 150).

As they arrived at the box car three of the men started up the steps in the retaining wall separating the railroad tracks from the plant, but were apparently stopped by a signal from E. R. Daugherty (R. p. 51).

A few minutes later, another man in the group came between the retaining wall and the box car and called to Henry Cumbia, Superintendent, to "stop the mill" (R. 53).

The group of men "were mouthing up there at the men" (R. 53, 193, 212, 213). One of them was using profane language. "He hollered at the men and shouted 'You are no

Goddamed white man,' repeating this at least a dozen times" (R. 53).

The group of men were on the railroad tracks, standing close together at and around the box car, facing the plant. They were talking and hollering at the men working in the plant (R. 56, 72, 102, 182, 119, 120, 121, 135, 149).

After a while rocks were thrown at and into the plant and yard and, as a result, it was necessary to suspend work at the mill to protect the workers from being injured, and no further work was done in and about the plant until after complaint had been made to the Sheriff's Office and the officers arrived and ordered the men off of the railroad tracks (R. 124, 153, 159, 189, 204).

It appears that rocks were thrown intermittently over a period of time. One witness stated that they were falling for about an hour (R. 187). Grover Lee Cumbia saw 2 or 3, then saw 5 or 6, later saw 4 or 5. One of the last batch hit him on the ankle (R. 116). John Aldridge saw 4 or 5 that came from the direction of the railroad track (R. 186), and saw the rock hit Cumbia (R. 188).

One of the workers in the plant notified the foreman that rocks were being thrown, and upon going to investigate, he saw a rock coming straight at him. He jumped to get out of the way. It passed within 12 inches of John Aldridge's head, and was coming with such force it spattered when it hit a piece of iron, and a piece of it struck him on the leg (R. 151-2). It was thrown from the east end of the box car (R. 151). Henry Cumbia saw 3 or 4 rocks coming from over the east end of the retaining wall at the box car (R. 56).

Maynard Wilkinson saw the rock that hit E. G. Raney, and said it came from the railroad track (R. 142). Edward Cumbia was inside the box car loading lumber. He stated that several handfuls were thrown against the car and on top of it. This was done several times over a period of an

hour (R. 216). When one of the rocks came inside the car, Cumbia came out of the car (R. 216, 220).

Between the time the work in the mill was suspended and the arrival of the officers, the group of men remained on the tracks by the car, none left and no one else joined them (R. 40, 58). They remained, shouting at the workers and milling about (R. 153-4). When the officers arrived the group was standing on the tracks together near the box car, facing the mill (R. 244, 245, 349, 350, 259). When the first officer arrived, two or three of the group were seen dropping rocks on the railroad tracks (R. 259, 260). One of the men was standing in front of the crowd facing the mill with a flat piece of iron in his hand, an inch wide and a yard long (R. 254).

All of the petitioners were identified as being in the group of men causing the disturbance on June 3, 1955. The evidence as to the part each one of the petitioners took is as follows:

Curtis Coleman: When the officers arrived was standing in front of the crowd facing the mill, with an iron bar in his hand (R. 254).

E. R. Daugherty, Jr.: The trial court found that this petitioner was apparently the leader of the unruly group of men (R. 382). When the group came on the railroad tracks, Daugherty was in the front ranks (R. 148). He took a position at the west end of the box car and apparently stood there facing the mill until the officers arrived (R. 174, 202, 245, 250). He was standing within two feet of a striker who was cursing the workers, and in a position to see the rocks as they fell on the mill (R. 54, 191-2). When the officers arrived, Daugherty acted as spokesman for the crowd, and eventually gave the orders for the crowd to leave the tracks (R. 245, 250, 253, 298).

Leroy Parham was sitting to the west of the box car piling rocks (R. 52).

John M. Price cursed the workers at least a dozen times, "You all are no God damned white man" (R. 54), and said to Maynard Wilkinson as he dodged rocks, "No use for you to look so mean and mad about it" (R. 135).

Ambrose Stith, Jr., William B. Stith and Eugene Stith left the group on the tracks and started up the steps in the retaining wall towards the mill until called back by Daugherty. Eugene Stith was intoxicated at the time (R. 51, 130).

Ambrose Stith, Sr., walked between the box car and the mill and called to Henry Cumbia to "stop the mill" (R. 53).

Mark Stith was standing close to John M. Price giving signals and waving his arms while Price was cursing (R. 54, 58).

Cleveland Stith called from the group "you all come on here," and was at the box car hollering and pointing his fingers at the working men (R. 149, 174).

At the June, 1955, Term of the Circuit Court of Brunswick County, the Grand Jury returned an indictment against forty-two defendants, including the petitioners, charging them with four counts, as follows:

1. A felony: Throwing rocks at and against a building whereby the lives of the occupants were put in jeopardy in violation of Section 18-210 of the Code of Virginia.

2. A misdemeanor: Interfering with the persons therein named in the exercise of their right to work by the use of force, threats of violence and intimidation, contrary to Section 40-64 of the Code of Virginia.

3. A misdemeanor: Committing assaults and batteries by mob violence in violation of Section 18-38 of the Code of Virginia.

4. A misdemeanor: Unlawful picketing contrary to the provisions of Section 40-64 of the Code of Virginia. This last count charged the offense against only fourteen persons. This last count was *nolle prosequied* at the time the case was called for trial.

At the completion of the Commonwealth's presentation of its evidence, the court sustained a motion to strike all of the evidence as to the first count of the indictment on the ground that a lumber planing mill is not a building within the purview of Section 18-210 of the Code of Virginia.

Forty-one of the persons in the crowd were found guilty as charged in the second count of the indictment of violating Section 40-64 of the Code of Virginia (Appendix A). Fines were imposed upon thirty-one of the men; jail sentences and fines were imposed on the remaining ten men.

The judgment of the Circuit Court of Brunswick County is found in Appendix B to this brief. The ten petitioners then filed a petition for a writ of error and supersedeas in the Supreme Court of Appeals of Virginia. On January 18, 1956, the said Supreme Court of Appeals rejected said petition and refused said writ of error and supersedeas on the ground that the judgment of the trial court was plainly right (Appendix C). On the 13th day of April, 1956, the ten petitioners filed their petitions for a writ of certiorari in this Court.

II.

THE QUESTIONS PRESENTED

The sole question before this Honorable Court at the present time is: Does the Supreme Court of the United States have jurisdiction to review the decisions of the Circuit Court of Brunswick County and the Supreme Court of Appeals of Virginia, since such decisions rested on a non-federal ground?

III.

ARGUMENT

The Decision of the Circuit Court of Brunswick County Rested on a Non-Federal Ground, Therefore, This Honorable Court Does Not Have Jurisdiction to Hear This Case.

This Court will not review decision of State courts when their decisions rest on non-federal grounds. *Hedgebeth* v. *North Carolina*, 334 U. S. 806; *McCoy* v. *Shaw*, 277 U. S. 302, and *Howat* v. *Kansas*, 258 U. S. 181. Furthermore, this Court has repeatedly held it is without jurisdiction to review a judgment of a state court unless it clearly appears that the decision turned on a federal question, *Stembridge* v. *Georgia*, 343 U. S. 541, and *Copperweld Steel Co.* v. *Industrial Commission*, 324 U. S. 780.

The petitioners at no stage of the proceedings below or in their petition for a writ of certiorari allege that Section 40-64 of the Code of Virginia is unconstitutional. That section reads, in part, as follows:

> "No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person to induce or attempt to induce him to quit his employment or refrain from seeking employment." (Appendix A)

The facts are that this unruly group of men did curse the workers remaining on the job and did throw rocks at the workers, striking at least two of the workers, and did not cease these unlawful activities until the mill was shut down.

This plainly constituted a violation of the Virginia statute. The evidence in the Circuit Court supported the find-

ings of fact by the court that all ten of the petitioners were members of the unruly mob and that all of them loaned their support and encouragement to the lawless acts of intimidation and violence committed by some members of the mob.

The applicable law of Virginia, which has been reaffirmed by the Supreme Court of Appeals of Virginia in many cases, is stated in *Brown* v. *Commonwealth*, 130 Va. 733, 736, 107 S. E. 809, 810, 16 A. L. R. 1039, as follows:

> "'A principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient distance.' Minor's Synopsis Crim. Law, page 11. See also *Horton's Case*, 99 Va. 848, 38 S. E. 184.
>
> "'Every person who is present at the commission of a trespass, incouraging or inciting the same by words, gestures, looks or signs, or who in any way, or by any means, countenances or approves the same, is, in law, assumed to be an aider and abettor, and is liable as principal.' Plaintiff's Instr. No. 1 in *Daingerfield* v. *Thompson*, 33 Gratt. (74 Va.) 136, 148, 36 Am. Rep. 783, approved by this Court as law.
>
> "Mere presence when a crime is committed is, of course, not sufficient to render one guilty as an aider or abettor. There must be something to show that the person present and so charged, in some way procured, or incited, or encouraged, the act done by the actual perpetrator. *Kemp's Case*, 80 Va. 443, 450. But whether a person does in fact aid or abet another in the commission of a crime is a question which may be determined by circumstances as well as by direct evidence." See also *Foster* v. *Commonwealth*, 179 Va. 96, 18 S. E. 2d 314; *James* v. *Commonwealth*, 178 Va. 28, 16 S. E. 2d 296; *Hurd* v. *Commonwealth*, 159 Va. 880, 165 S. E. 536; *Hodge* v. *Winchester*, 153 Va. 904, 150 S. E. 392; *Boggs* v. *Commonwealth*, 153 Va. 828, 149 S. E. 445; *Shiflett* v. *Commonwealth*, 151 Va. 556, 145 S. E. 336.

Every person who is present lending countenance, aiding or abetting another in the commission of an offense, is liable to the same punishment as if he had actually committed the offense. In misdemeanor cases there are no accessories, but all participants in the crime are principals. *Hodge* v. *Winchester, supra; Foster* v. *Commonwealth, supra; Wooden* v. *Commonwealth*, 117 Va. 930, 86 S. E. 305; *Watts* v. *Commonwealth*, 99 Va. 872, 880, 39 S. E. 706. In felony cases such accessory is a principal in the second degree but is tried and punished as if a principal in the first degree. Section 18-3, Code of Virginia. Therefore, unless otherwise stated, if a statute makes an act criminal, it imposes on all persons who are present purposely giving aid and comfort to the actual wrongdoer criminal responsibility equal to that of the wrongdoer. *Adkins* v. *Commonwealth*, 175 Va. 590, 9 S. E. 2d 349; *Rasnake* v. *Commonwealth*, 135 Va. 677, 115 S. E. 543; *Wooden* v. *Commonwealth, supra.*

If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who in any way participate in bringing it about are equally responsible and bound by the acts of every other person connected with the consummation of the resulting crime. The question of whether the crime is the natural and probable result of the intended wrongful act is one for the jury or trial judge. *Spradlin* v. *Commonwealth*, 195 Va. 523, 79 S. E. 2d 607; *Hurd* v. *Commonwealth, supra; Boggs* v. *Commonwealth, supra; Brown* v. *Commonwealth, supra.*

In *United States* v. *Peoni*, 100 F. 2d 401, 402, Judge Learned Hand said:

> "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's con-

duct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by action to make it succeed. All the words used —even the most colorless, 'abet'—carry an implication of purposive attitude towards it."

In the instant case, this mob of men came to the C. H. Perkinson, Inc., Mill for one purpose, to persuade the workers to leave the mill and thereby close down the mill. This point is discussed by the trial court in its opinion, and the respondent would like to quote a portion of that opinion which it feels covers this question very adequately.

"They say they were there solely for the purpose of advertising to the railroad workers who might be members of the union also and gain their sympathy.

"Let us see whether that was the purpose. When they got down there some of the people started up to the mill. One of them, Ambrose Stith, Sr., hollered to Mr. Cumbia, the Superintendent there, to shut the mill down, or stop the mill, or words to that effect. Does that advertise to the railroad employees that they were on strike? Ambrose Stith, Jr., started up the steps in the retaining wall toward the mill. Another one, Price, was waving the strikers on towards him. Was that to advertise to the railroad employees? Obviously it was a plan designed to stop the mill. They were determined to stop it, and they went and pursued their course of action until they did stop it.

"One of them, Cleveland Price, called to the men to come down, come on here, trying to get them to come out.

"James M. Price, while standing not more than two feet from E. R. Daugherty, Jr., John M. Price, and looking toward the men working at the mill said, and there is no use for me to repeat the vile language, but you GD - - - he said 'You all ain't no GD white man.'

"What was the purpose? Who was he talking to? Men on the train? There wasn't any train there.

"Then rocks were thrown. Some were thrown from the east end of the car, according to the testimony, but mostly from the west. Nobody could see who threw the rocks, but they came out of the crowd. They came from that direction.

"There were rocks on the railroad, and the men were down on the railroad, at least two persons were struck by rocks. One of them was struck directly and the other one by a rock that hit some metal piece or something and broke. Not any serious damage done to any body, fortunately. But nevertheless it was a resort to violence, to accomplish their purpose.

"No one in the crowd turned off and left and went away because it was getting too rough. Nobody turned and went away and said 'You all are getting too rough here, I am not going to be a party to this.' They all stayed.

"This action stopped as soon as the mill shut down, everything became quiet and peaceful, as far as an incident of this kind was concerned. They didn't go away, though. Was this waiting for a train? They didn't want the mill to start up again. Was it interfering with the work? Was it intimidation? I cannot see how it could be anything else.

"40 of those present have been identified. All of them were on strike either from that mill or from other mills. They all belonged to the Union, which was perfectly all right. They all had a common interest in the outcome of the strike. Some of them were carried there by Mr. Daugherty from another mill. They were all grouped together, plainly I think they were there for a common purpose. The purpose was to induce those at the mill to quit their work by threats, insulting language, by throwing rocks and by menacing gestures. Cleveland Price was shaking his fingers at them up there. The most flagrant violation of that particular statute which you could hardly imagine.

"Some have been identified who committed certain overt acts. But all others present were plainly aiding, abetting, counseling, advising, consumating and consenting to the unlawful acts." (R. 377-380)

In the instant case, as in the case of *Cole* v. *Arkansas*, 338 U. S. 345, the trial court correctly construed the State statute involved as not in any way prohibiting peaceful picketing. The Court held:

"As I have said before I do not look upon with disfavor at all on labor organizing to better itself. I do not know where we would be today if it didn't do that. Nor do I nor does the law look upon with disfavor peaceful picketing. Those are certain inalienable rights that people have, so long as they stay within the law and engage in peaceful picketing." (R. p. 376)

There is ample and sufficient evidence to support the convictions of all ten of the petitioners of violating Section 40-64 of the Code of Virginia. In *Cole* v. *Arkansas, supra*, this Honorable Court gave its approval to a state statute which prohibited persons acting in concert from assembling in an attempt to prevent by force or violence some other person from engaging in a lawful occupation. This Court held:

"Quite another question is involved when one is convicted of promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence. Such an assemblage has been denominated unlawful by the Arkansas legislature, and it is no abridgment of free speech or assembly for the criminal sanctions of the state to fasten themselves upon one who has actively and consciously assisted therein." (338 U. S. at 353)

The respondent respectfully submits that there is sufficient evidence to show that each of the ten petitioners "actively and consciously assisted" in the threats, intimidation, and violence; and, therefore, there is no question of depriving the petitioners of due process of the law under the Fourteenth Amendment to the United States Constitution. The respondent prays that this Honorable Court will dismiss the petition of the petitioners on the ground that the decisions of the State courts below were based on a non-federal ground.

IV.

CONCLUSION

Wherefore, the respondent respectfully submits that, for the reasons stated, this Court does not have jurisdiction to review the decisions of the State courts below, since their decisions rest solely upon a non-federal ground, there being no federal question involved, and the respondent respectfully moves the Court to dismiss the petitioners' petition for writ of certiorari.

Respectfully submitted,

J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

May 10, 1956

APPENDIX A

Constitution of the United States

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Statute

(Code, 1950)

"§ 40-64. *Preventing persons from pursuing lawful vocations, etc.; illegal picketing; injunction.*—No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person to induce or attempt to induce him to quit his employment or refrain from seeking employment.

No person shall engage in picketing by force or violence, or picket alone or in concert with others in such manner as to obstruct or interfere with free ingress or egress to and from any premises, or obstruct or interfere with free use of public streets, sidewalks or other public ways.

When a strike or lockout is in progress, no person who is not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and punished accordingly.

Notwithstanding the punishments herein provided any court of general equity jurisdiction may enjoin picketing prohibited by this section, and in addition thereto, may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder, restrain coercion, protect life or property, or promote the general welfare. (1946, p. 392; Michie Suppl. 1946, § 4711a; 1952, c. 674.)"

APPENDIX B

Judgment of the Circuit Court

VIRGINIA: IN THE CIRCUIT COURT FOR BRUNSWICK COUNTY

August 18, 1955

Commonwealth

vs.

Indictment for Felony and 2 Counts for Misdemeanor Case #5

James Barnes and Others

(Write All Names When Spread on Book)

This day came again the Attorney for the Commonwealth and came also James Barnes, Morgan Branson, Emmett Brown, Curtis Coleman, David Leon Cook, James Melvin Davis, E. R. Dougherty, Jr., Eddie Lewis Drummond, George Edmunds, Obediah Elder, Robert L. Elder, Robert T. Elder, Leon M. James, Pharoah Johnson, Waverly Kinchen, Osborne Marshall, John Merrit, Levi Merrit, Leroy Parham, Richard Peterson, John M. Price, Willie E. Price, Charlie Short, Rufus Smith, Ambrose (Ambress) Stith, Jr., Ambrose (Ambress) Stith, Sr., Cleveland Stith, Eugene Stith, Herbert Stith, Mark W. Stith, Solomon Stith, Jr., William B. Stith, Forrest Trotter, Melvin Trotter, George Hammack Sturdivant, Henry Tucker, William Tucker, W. I. Thomas, Roman Clarence Wyatt, Lester Williams and Hurley Yates, and came also counsel for the respective parties. And the Court having heard argument of counsel and having fully considered the evidence introduced on behalf of the Commonwealth and the defendants doth

find each of the defendants not guilty of the felony charge in the first count of the indictment and each of them are hereby discharged of the felony charged in said indictment and ordered to go thereof without day.

And the Court doth find the defendant Willie E. Price not guilty of the charge contained in the second and third counts of the said indictment, and accordingly he is ordered to go thereof without day.

And the court doth find the defendant E. R. Dougherty, Jr., guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $250.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court that the said E. R. Dougherty Jr., be confined in the jail of this county for the term of six months and that the Commonwealth of Virginia do recover against the said E. R. Dougherty Jr., the sum of $250.00, the fine aforesaid in form aforesaid assessed together with its costs about its prosecution in this behalf expended.

And the Court doth find the defendant Eugene Stith guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the court that the said Eugene Stith be confined in the jail of this County for the term of six months and the Commonwealth of Virginia do recover against the said Eugene Stith the sum of $50.00, the fine aforesaid in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant William B. Stith guilty as charged in the second count in said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the Court that the said William B. Stith be confined in the jail of this

County for six months and that the Commonwealth of Virginia, do recover against the said William B. Stith the sum of $50.00, the fine aforesaid in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Ambrose (Ambress) Stith, Sr. guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the Court and the sentence of the Court that the said Ambrose (Ambress) Stith, Sr. be confined in the jail of this county for the term of six months, and that the Commonwealth of Virginia do recover against the said Ambrose (Ambress) Stith, Sr. the sum of $50.00 the fine aforesaid in form aforesaid assessed together with its cost by it about its prosecution in this behalf expended.

And the Court doth find the defendant Ambrose (Ambress) Stith Jr., guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in the jail for the term of six months. It is accordingly the judgment of the court and the sentence of the Court that the said Ambrose (Ambress) Stith, Jr. be confined in the jail of this county for the term of six months and that the Commonwealth do recover against the said Ambrose (Ambress) Stith, Jr., the sum of $50.00 the fine aforesaid in form aforesaid assessed, together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant John M. Price, guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $250.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the Court that the said John M. Price be confined in the jail of this county for the term of six months and that the Commonwealth of

Virginia do recover against the said John M. Price the sum of $250.00, the fine aforesaid, in form aforesaid assessed, together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Mark W. Stith guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the court and the sentence of the court that the said Mark W. Stith be confined in the jail of this County for the term of six months and that the Commonwealth of Virginia do recover against the said Mark W. Stith the sum of $50.00, the fine aforesaid in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Leroy Parham guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in jail for the term of six months. It is accordingly the judgment of the Court and the sentence of the Court that the said Leroy Parham be confined in the jail of this County for the term of six months and that the Commonwealth of Virginia do recover against the said Leroy Parham the sum of $50.00, the fine aforesaid, in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendant Cleveland Stith guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $250.00 and confinement in jail for the term of six months. It is accordingly the judgment of court and the sentence of the court that the said Cleveland Stith be confined in the jail of this county for the term of six months and that the Commonwealth of Virginia do recover against the said Cleveland Stith the sum of

$250.00, the fine aforesaid, in form aforesaid assessed together with its costs about it about its prosecution in this behalf expended in this Court.

And the Court doth find the defendant Curtis Coleman guilty as charged in the second count of said indictment and doth fix his punishment at a fine of $50.00 and confinement in the jail for the term of six months. It is accordingly the judgment of the court and the sentence of the court that the said Curtis Coleman be confined in the jail of this county for six months and that the Commonwealth of Virginia do recover against the said Curtis Coleman the sum of $50.00 the fine aforesaid, in form aforesaid assessed together with its costs by it about its prosecution in this behalf expended.

And the Court doth find the defendants James Melvin Davis, Obediah Elder, Robert L. Elder, Robert P. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charles Short, George H. Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook guilty as charged in the second count of said indictment and doth fix the punishment of each of them at a fine of $25.00 and confinement in jail for the term of three months. It is accordingly the judgment of the court that the Commonwealth of Virginia do recover against James Melvin Davis, Obediah Elder, Robert L. Elder, Robert T. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen,

Osborne Marshall, Richard Peterson, Charlie Short, George Hammack Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook the sum of $25.00 each, the fine aforesaid, in form aforesaid assessed against each of them, together with its costs by it about its prosecution in this behalf expended, and that the said James M. Davis, Obediah Elder, Robert L. Elder, Robert T. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charlie Short, George Hammack Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook be and they are each hereby sentenced to confinement in the jail of this county for the term of three months and that they and each of them remain in jail until said fine and costs be paid.

And it appearing to the court that it is compatible with public interest so to do, it is ADJUDGED AND ORDERED that execution of three months of the jail sentence of six months imposed upon Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Sr., Ambrose (Ambress) Stith, Jr., Mark W. Stith, Leroy Parham and Curtis Coleman, by the judgments aforesaid, be and the same is hereby suspended for a period of three years from this date, upon condition that they, and each of them, pay the fine and costs assessed against them, by the judgment aforesaid and upon further condition that they and each of them shall keep the peace, be of good behavior and not violate any of the laws of the State of Virginia or any political subdivision thereof, during said period of three years.

And it is further ordered that execution of the three months

jail sentence imposed by the judgment aforesaid against James Davis, Obediah Elder, Robert L. Elder, Robert T. Elder, Pharoah Johnson, John Merrit, Levi Merrit, Rufus Smith, Herbert Stith, Solomon Stith, Jr., Melvin Trotter, W. I. Thomas, Lester Williams, James Barnes, Morgan Branson, Emmett Brown, Forrest Trotter, Hurley Yates, Eddie Lewis Drummond, George Edmonds, Leon M. James, Waverly Kinchen, Osborne Marshall, Richard Peterson, Charlie Short, George Hammack Sturdivant, Henry Tucker, William Tucker, Roman Clarence Wyatt and David Leon Cook, be, and the same are hereby suspended for a term of three years from this date upon condition that they, and each of them, pay the fine and costs assessed against them by the judgment aforesaid and upon the further condition that they and each of them be of good behavior, keep the peace, and not violate any of the laws of the Commonwealth of Virginia or any political subdivision thereof during the term of three years.

Whereupon the defendants E. R. Dougherty, Jr., Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Jr., Ambrose (Ambress) Stith, Sr., John M. Price, Mark W. Stith, Leroy Parham, Cleveland Stith and Curtis Coleman, by counsel, moved the court to set aside the judgment entered against each of them on the grounds stated on yesterday in their motion to strike the evidence and on the further grounds that the accused are being denied their liberties under the due process clause of the 14th Amendment of the Constitution of the United States and the constitution of the State of Virginia, which motion the court doth overrule, and to the action of court in overruling said motion, each of said defendants, by their counsel, excepted.

And the defendants E. R. Dougherty, Jr., Eugene Stith, William B. Smith, Ambrose (Ambress) Stith, Sr., Ambrose (Ambress) Stith, Jr., John M. Price, Mark W. Stith, Leroy

Parham, Cleveland Stith, and Curtis Coleman, by counsel, having indicated their intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to the judgments rendered against them, and each of them, on motion of said defendants, by their counsel, it is ordered that execution of the judgments pronounced against these said defendants be and the same is hereby suspended until October 25, 1955 in order that they may apply for a writ of error to the judgments rendered against them as aforesaid.

Whereupon E. R. Dougherty, Jr., together with George L. Nalls, his surety, who justified on oath as to his sufficiency acknowledged themselves indebted to the Commonwealth of Virginia in the sum of $1,000.00, upon condition that the said E. R. Dougherty, Jr., shall make his personal appearance before this court on October 25, 1955, at 10:00 o'clock A. M. to submit to the judgment of the Court and to abide such further action of the court in the premises as may be necessary and proper and in the meantime that the said E. R. Dougherty, Jr., shall keep the peace, be of good behavior and not violate any of the laws of the State of Virginia, or any of the political sub-divisions thereof and that he shall not depart without the leave of this court.

And the defendants Eugene Stith, William B. Stith, Ambrose (Ambress) Stith, Sr., Ambrose (Ambress) Stith, Jr., John M. Price, Leroy Parham, Cleveland Stith, and Curtis Coleman, together with George L. Nalls, their surety, who justified on oath as to his sufficiency, each jointly and separately recognized themselves to be indebted to the Commonwealth of Virginia for the sum of $500.00 each, upon condition that the said defendants and each of them shall make their personal appearance before this Court on October 25, 1955 at 10:00 o'clock A. M. and submit to the judgment of the Court and abide such further action of the court in the premises as may be necessary and proper, and

not depart without leave of court, and in the meantime to be of good behavior, keep the peace, and not violate any of the laws of the Commonwealth of Virginia, or any political subdivision thereof.

And the defendant Mark W. Stith not being in Court, on motion of his counsel he is allowed until August 22, 1955 to give a recognizance, with surety approved by the Clerk of this Court, in the sum of $500.00 for his appearance on October 25, 1955 to submit to the judgment of this Court etc.

And the Court doth find each of the defendants named in the third count of the indictment, they being the same persons whose names are set forth in the caption of this order, not guilty, of the misdemeanor charged in the third count of said indictment, and they, and each of them are hereby ordered to go thereof without day.

Chy. Order Book
22 Page 352

A Copy Teste:

M. H. TURNBULL *Clerk*
By WILLIE B. ABERNATHY *Deputy Clerk*

APPENDIX C

Memorandum of Affirmance by the Supreme Court of Appeals

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday *the* 18th *day of* January, 1956.

The petition of E. R. Dougherty, Jr., Eugene Stith, William B. Stith, Ambrose Stith, Sr., Ambrose Stith, Jr., John M. Price, Mark Stith, Leroy Parham, Cleveland Stith and Curtis Coleman for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Brunswick County on the 18th day of August, 1955, in a prosecution by the Commonwealth against the said petitioners for a felony and misdemeanors, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Circuit Court.

A Copy, Teste:

H. G. TURNER
Clerk

(SEAL)

3216

MAY 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 856

COMMONWEALTH OF VIRGINIA,

Respondent,

against

E. R. DAUGHERTY, JR., EUGENE STITH, WILLIAM B. STITH, AMBROSE STITH, SR., AMBROSE STITH, JR., JOHN M. PRICE, MARK STITH, LEROY PARHAM, CLEVELAND STITH and CURTIS COLEMAN,

Petitioners.

PETITIONERS' REPLY BRIEF

I

The Constitutional Question

The opposing brief argues that the petitioners, "at no stage of the proceedings below or in their petition for a writ", alleged that the Virginia statute is unconstitutional (p. 7).

The position of each of the petitioners separately considered is, as made clear in our brief, that he has been denied rights under the federal Constitution by reason of *the application* of the state statute in such wise as to

incriminate him by his mere presence. (Petitioners' brief, p. 9.)

Specifically, each petitioner submits that they "were being denied their liberties under the due process clause of the Fourteenth Amendment of the Constitution of the United States" and under those other constitutional guaranties of "liberty" which are embraced therein.

This claim was duly made in the Trial Court. (Petitioners' brief, p. 6.) It was one of the "Errors Assigned" upon appeal to the Virginia Supreme Court. It has been argued in Points I and II of the petition for writ of certiorari.

Violations of the federal Constitution by the judgment of the state courts are, we submit, involved; and hence this Court has review jurisdiction.

> *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780, 785;
> *Wolfson & Kurland*, Jurisdiction of the Supreme Court of the United States, Sec. 11, p. 24.

II

Presence in the Picket Line

The respondent argues (p. 7) that "this unruly group of men" cursed the workers in the mill and then threw rocks at them, in violation of the state statute.

Each petitioner separately submits that as to him there was not one particle of probative evidence connecting him with any act of violence.

Nor is there one shred of evidence that any one of them, with the exception of John M. Price, did any cursing. What he said was, "You all are no God damned white man." This, it is conceded, is not "drawing room" or

"parlor car" language, but neither reason nor the state statute confines those in a picket line to such language. (*McWhorter* v. *Commonwealth*, 191 Va. 857, 865; 63 S. E. 2d 20, 24.)

Each petitioner expressly invokes the constitutional principle which was left open for future decision in *Cole* v. *Arkansas*, 338 U. S. 345, 352, and which becomes applicable where there are involved liberties of expression and assembly and those rights to fairness essential where one is in jeopardy of fine and jail.

This constitutional principle has, *since our petition and brief were filed*, been applied by the United States Court of Appeals for the District of Columbia in *Garment Workers Union* v. *NLRB*, in a decision handed down May 3, 1956 (38 LRRM 2061).

There the Board had denied reinstatement to numerous employees because of incidents of violence occurring during a strike. In so doing, the Board said (23 U. S. Law Week, p. 2290):

> "Nor is the right to strike impaired by our decision. We do not hold, as stated in the dissent, that strikers who are themselves blameless are responsible for the lawlessness of strangers. But we do say that strikers have no right to protection when they, at the very least, welcome the aid of criminal elements who took over their strike and desecrated it with violence and terrorism. * * * We do not suggest, as the dissent states, that the strikers could have purged themselves only by abandoning their picketing. There were other avenues open to them by which they could have disavowed the misconduct. They chose none of them. We fail to see that the requirement that strikers keep their strike within legal bounds abridges their right to strike."

The U. S. Court of Appeals set aside this decision by the Board (38 LRRM 2061; 24 U. S. Law Week 2513). It said, in language much in point here (38 LRRM 2065):

> "The Board says that the strikers erred when they continued picketing during the 'violent strike' and failed to repudiate and denounce violence which was 'committed on their behalf.' From these two factors, the Board concludes that the strikers 'welcomed, approved and ratified' the misconduct and therefore forfeited their right to relief.
>
> "*A conclusion of ratification drawn from mere failure to abandon picketing would curtail an important statutory and constitutional right.* Curtailment of this right is justified only when violence has 'given to the picketing a coercive effect whereby it would operate destructively as force and intimidation.' *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 298, 7 LRRM 310 (1941). As the Union points out, the Board made no finding that the picket line itself had 'a coercive effect,' or that the picketers themselves contributed to the violence.
>
> "Nor can a conclusion of 'ratification' rest on the strikers' failure to disassociate themselves from misconduct by 'admonishment, denunciation, or public pronouncement.' Aside from the question whether these terms suggest a meaningful course of conduct that the strikers may have elected, we think *they were under no obligation to disavow misconduct which they did not initiate and with which they are not shown to have been connected, directly or indirectly. United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 395 (1922). And their silence provides no rational basis for inferring that they acquiesced in the wrongs of others with whom no agency relationship is shown. *United Electrical Workers* v. *National Labor Relations Board*, 96 U. S. App. D. C. 46, 51, 223 F. 2d 338, 343, 36 LRRM 2176 (1955), makes clear that such a relation-

ship is an essential prerequisite to the inference which the Board seeks to draw from the strikers' silence." (Emphasis ours.)

The alien doctrine of guilt by association is excluded by our American jurisprudence and by various constitutional guaranties, such as the rights of free assembly and free speech and those other canons of decency and fair play inherent in the whole concept of due process.

The position of each petitioner here is that the doctrine of guilt by association is at the bottom of the application made of the Virginia statute in his case; that such application would jeopardize the constitutional right to picket by putting everyone in the picket line at the penal hazard of misconduct by some individual member thereof; and that it would convert into criminal guilt a failure immediately to withdraw from picketing and to make disavowal.

Such considerations invoke Due Process, as to which this Court has said in *Rochin* v. *California*, 342 U. S. 165, 169:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' *Malinski* v. *New York*, *supra*, at 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and con-

science of our people as to be ranked as fundamental,' *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' *Palko* v. *Connecticut*, 302 U. S. 319, 325."

Respectfully submitted,

CHARLES H. TUTTLE
BEECHER E. STALLARD
FRANCIS X. WARD
Of Counsel for Petitioners

STALLARD & KEENE
Central National Bank Building
Richmond 19, Virginia
Attorneys for Petitioners